IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs November 17, 2009

STATE OF TENNESSEE v. MELVIN PEARSON RUCKER

Appeal from the Circuit Court for Bedford County
No. 16437 Robert Crigler, Judge

No. M2008-02816-CCA-R3-CD - Filed March 9, 2010

Appellant, Melvin Pearson Rucker, was convicted by a Bedford County jury of possession of more than .5 grams of cocaine with the intent to sell, possession of more than .5 grams of cocaine with the intent to deliver, and driving on a suspended license. As a result, the trial court merged the conviction for intent to deliver cocaine with the conviction for the intent to sell cocaine and sentenced Appellant to an effective sentence of eleven years and six months. After the denial of a motion for new trial, Appellant presents the following issues for our review on appeal: (1) whether the evidence was sufficient to support Appellant's convictions for possession of more than .5 grams of cocaine with the intent to sell and possession of more than .5 grams of cocaine with the intent to deliver; and (2) whether the trial court properly sentenced Appellant. Because the evidence was sufficient to support the convictions and the trial court properly sentenced Appellant, the judgments of the trial court are affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which THOMAS T. WOODALL and CAMILLE R. MCMULLEN, JJ., joined.

Michael J. Collins, Shelbyville, Tennessee, for the Appellant, Melvin Pearson Rucker.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; Charles Crawford, District Attorney General, and Michael D. Randles, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

Appellant was indicted by the Bedford County Grand Jury in February of 2008 for possession of more than .5 grams of cocaine with the intent to sell, possession of more than .5 grams of cocaine with the intent to deliver, and driving on a suspended license.

The case proceeded to trial where Shelbyville Police Detective Brian Crews testified. About a week prior to Appellant's arrest, Detective Crews learned that Appellant planned on driving from Shelbyville to Nashville for the purpose of transporting crack cocaine. Detective Crews knew that Appellant had a suspended driver's license.

As a result of his preliminary investigation, Detective Crews set up surveillance on Highway 231 North in hopes that they would apprehend Appellant. On July 20, 2007, Detective Crews and Detective Charles Merlo saw a white Monte Carlo with a driver that matched the description of Appellant. When the officers ran the tags on the car, it was registered to Appellant.

The detectives initiated a traffic stop of Appellant's car. Detective Crews ordered Appellant to exit the car and informed him that he was under arrest for driving on a suspended license. Appellant appeared nervous and started to cry when he was asked to step out of the car. The detectives were suspicious based on Appellant's behavior.

In the search incident to arrest, Detective Crews observed three cell phones in the car. One of the phones was on the floorboard and two of the phones were in the seat next to the driver. There was a stack of clothes on the seat next to the driver's side. When Detective Crews lifted the pile of clothing, he located a pill bottle. Inside the pill bottle was a plastic bag that contained a large, white, rock-like substance. The bottle also contained smaller loose pieces of a white, rock-like substance. The detectives suspected that the matter was cocaine. Appellant was carrying $385 in cash.

Appellant did not admit to ownership of the cocaine and refused to make a statement other than to admit that he uses crack cocaine. The substances found in the pill bottle weighed a total of 2.9 grams. The large rock was weighed and tested. The results found it to weigh 2.2 grams and was determined to be crack cocaine.

According to Detective Crews, a typical drug seller keeps a large quantity of the drug to sell alone or breaks off a small part to sell in $20 or $40 "rocks." A $40 rock of cocaine would normally weigh about .4 grams.

Tim Lane, the Director of the 17th Judicial Drug and Violent Crime Task Force testified that he had been the director for thirteen years. In that time, he had seen hundreds of crack cocaine users. They normally do not carry a lot of money because as cocaine users, their addiction drives them to

use any money they have to purchase cocaine. Director Lane opined that a typical user buys between .2 and .5 grams of cocaine and is in possession of drug paraphernalia, like a crack pipe.

In Director Lane's opinion, a person carrying between 2.2 and 2.9 grams of cocaine, $385 and three cell phones would be a likely candidate for drug trafficking. Director Lane stated that 2.2 grams of cocaine was a large amount of cocaine for Shelbyville. In his experience, drug dealers drive older cars so that they do not draw attention to themselves.

Appellant did not testify at trial.

At the sentencing hearing, on the other hand, Appellant testified that he was thirty-two and had never gone by the name "Melvin Bernard Rucker." Appellant denied committing an aggravated burglary in Davidson County on June 6, 2008. Further, Appellant denied using marijuana on a daily basis since the age of twenty-nine until his arrest. In fact, Appellant denied using marijuana for the three years preceeding his arrest.

Appellant admitted to some of his prior criminal history, including pleading guilty to a drug charge in Davidson County in March of 1998 and a felony drug offense that occurred just prior to his drug charges. Appellant received a suspended sentence for this offense, but it was revoked in December of 2001. After Appellant served six months of the sentence, he was reinstated to probation.

Appellant had a GED and had completed one year of college. When he was arrested, Appellant was employed with JDI Multi Media Group and Get Busy Productions.

Laura Prosser, the representative from the Board of Probation and Parole that prepared the presentence report, testified at trial. According to Ms. Prosser, Appellant committed the cocaine offenses at the time he was out on bond for a Davidson County charge of aggravated burglary. Appellant informed Ms. Prosser that his name was "Melvin Pearson Rucker" and that he lived in Davidson County. Appellant also informed Ms. Prosser that he had used marijuana on a daily basis for the previous three years.

Appellant had two prior convictions for possession of a weapon with the intent to go armed, a conviction for casual exchange, a conviction for possession of less than .5 grams of cocaine, driving on a suspended license, and reckless driving. At the conclusion of the sentencing hearing, the trial court merged the two convictions for possession into one conviction for possession of more than .5 grams of cocaine with the intent to sell. Appellant received a sentence of eleven years and six months for the possession conviction and six months for the driving on a suspended license conviction. The trial court ordered the sentences to be served concurrently.

Appellant filed a motion for new trial. The trial court denied the motion. Appellant subsequently filed a notice of appeal.

Analysis
Sufficiency of the Evidence

Appellant argues on appeal that there was no evidence introduced at trial to prove that he was either taking the cocaine to sell or deliver to another person. In other words, Appellant contends that the cocaine was for personal use. The State, on the other hand, argues that the amount of cocaine, the amount of cash on Appellant's person, and the location of three cell phones, supported the inference that Appellant possessed the cocaine with the intent to sell it.

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. A verdict of guilty, rendered by a jury and "approved by the trial judge, accredits the testimony of the" State's witnesses and resolves all conflicts in the testimony in favor of the State. *State v. Cazes*, 875 S.W.2d 253, 259 (Tenn. 1994); *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). Thus, although the accused is originally cloaked with a presumption of innocence, the jury verdict of guilty removes this presumption "and replaces it with one of guilt." *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with the defendant to demonstrate the insufficiency of the convicting evidence. *Id.* The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. *See* Tenn. R. App. P. 13(e); *Harris*, 839 S .W.2d at 75. In making this decision, we are to accord the State "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." *See Tuggle*, 639 S.W.2d at 914. As such, this Court is precluded from re-weighing or reconsidering the evidence when evaluating the convicting proof. *State v. Morgan*, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own "inferences for those drawn by the trier of fact from circumstantial evidence." *Matthews*, 805 S.W.2d at 779. Further, questions of witness credibility, the weight and value of evidence, and resolution of conflicts in the evidence are entrusted to the trier of fact. *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996).

Appellant was convicted of a violation of Tennessee Code Annotated section 39-17-417(a)(2), (3). "It is an offense for a defendant to knowingly . . . . [d]eliver a controlled substance . . . [or] [s]ell a controlled substance." T.C.A. § 39-17-417(a)(2), (3). A violation of subsection (a) is a Class B felony if the person has .5 grams or more of any substance containing cocaine. T.C.A. § 39-17-417(c)(1). "[A] person . . . acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist." T.C.A. § 39-11-302(b). As stated above, circumstantial evidence alone may be sufficient to support a conviction. *State v. Tharpe*, 726 S.W.2d 896, 899-900 (Tenn. 1987); *State v. Gregory*, 862 S.W.2d 574, 577 (Tenn. Crim. App. 1993). The circumstantial evidence "'must be not only consistent with the guilt of the accused but it must also be inconsistent with innocence and must exclude every other reasonable theory or hypothesis except that of guilt, and it must establish such a certainty of guilt of the accused as to convince the mind beyond a reasonable doubt that [the defendant] is the one who committed the crime.'" *Tharpe*, 726 S.W.2d at 900 (quoting *Pruitt v. State*, 460 S.W.2d 385, 390 (Tenn. Crim. App. 1970)). Further, it is permissible for the jury to draw

an inference of intent to sell or deliver when the amount of the controlled substance and other relevant facts surrounding the arrest are considered together. T.C.A. § 39-17-419; *see also State v. Willie Earl Kyles*, Jr., No. W2001-01931-CCA-R3-CD, 2002 WL 927604, at *2 (Tenn. Crim. App., at Jackson, May 3, 2002), *perm. app. denied*, (Tenn. Oct. 21, 2002) (concluding that jury could infer possession of drugs with intent to sell or deliver from amount of drugs and circumstances surrounding arrest of defendant); *State v. James R. Huntington*, No. 02C01-9407-CR-00149, 1995 WL 134589, at *3-4 (Tenn. Crim. App., at Jackson, Mar. 29, 1995), *perm. app. denied*, (Tenn. July 10, 1995) (determining that jury could infer intent to sell marijuana primarily from large quantity of marijuana in defendant's possession).

A review of the record reveals that the evidence was sufficient to support Appellant's convictions.[1] Appellant was in possession of a significant amount of cocaine at the time and place that he was arrested. Appellant began to cry when he was arrested for driving on a suspended license. The search of the car revealed that Appellant was also carrying three cell phones and almost $400 in cash, in addition to the cocaine. The testimony from the drug task force director indicated that all of Appellant's possessions were indicative of a drug dealer. We determine that this evidence is more than sufficient to support the convictions. Accordingly, Appellant is not entitled to relief on this issue.

Sentencing

Appellant complains on appeal that his sentence is excessive and that the trial court should have imposed a sentence of nine years or somewhere "closer to the middle of the range" because of "severe budget problems." The State, on the other hand, suggests that Appellant's sentence is supported by the evidence and that the trial court properly followed sentencing procedure.

"When reviewing sentencing issues . . . , the appellate court shall conduct a de novo review on the record of the issues. The review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d). "[T]he presumption of correctness 'is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.'" *State v. Carter*, 254 S.W.3d 335, 344-45 (Tenn. 2008) (quoting *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991)). "If . . . the trial court applies inappropriate mitigating and/or enhancement factors or otherwise fails to follow the Sentencing Act, the presumption of correctness fails." *Id.* at 345 (citing *State v. Shelton*, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992)). We are to also recognize that the defendant bears "the burden of demonstrating that the sentence is improper." *Ashby*, 823 S.W.2d at 169.

In making its sentencing determination, the trial court, at the conclusion of the sentencing hearing, first determines the range of sentence and then determines the specific sentence and the

[1] The trial court ultimately merged the conviction for possession of cocaine with intent to deliver with the conviction for possession of cocaine with the intent to sell.

appropriate combination of sentencing alternatives by considering: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the enhancement and mitigating factors; (6) any statistical information provided by the administrative office of the courts regarding sentences for similar offenses, (7) any statements the defendant wishes to make in the defendant's behalf about sentencing; and (8) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-210(a), (b), -103(5); *State v. Williams*, 920 S.W.2d 247, 258 (Tenn. Crim. App. 1995).

When imposing the sentence within the appropriate sentencing range for the defendant:

> [T]he court shall consider, but is not bound by, the following *advisory* sentencing guidelines:
>
> (1) The minimum sentence within the range of punishment is the sentence that should be imposed, because the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classifications; and
>
> (2) The sentence length within the range should be adjusted, as appropriate, by the presence or absence of mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114.

T.C.A. § 40-35-210(c) (emphasis added). However, the weight given by the trial court to the mitigating and enhancement factors is left to the trial court's discretion and is not a basis for reversal by an appellate court of an imposed sentence. *Carter*, 254 S.W.3d at 345. "An appellate court is . . . bound by a trial court's decision as to the length of the sentence imposed so long as it is imposed in a manner consistent with the purposes and principles set out in sections -102 and -103 of the Sentencing Act." *Id.* at 346.

"The amended statute no longer imposes a presumptive sentence." *Carter*, 254 S.W.3d at 343. As a result of the amendments to the Sentencing Act, our appellate review of the weighing of the enhancement and mitigating factors was deleted when the factors became advisory, as opposed to binding, upon the trial court's sentencing decision. *Id.* at 344. Under current sentencing law, the trial court is nonetheless required to "consider" an advisory sentencing guideline that is relevant to the sentencing determination, including the application of enhancing and mitigating factors. *Id.* The trial court's weighing of various mitigating and enhancement factors is now left to the trial court's sound discretion. *Id.*

To facilitate appellate review, the trial court is required to place on the record its reasons for imposing the specific sentence, including the identification of the mitigating and enhancement factors found, the specific facts supporting each enhancement factor found, and the method by which the mitigating and enhancement factors have been evaluated and balanced in determining the

sentence. *See id.* at 343; *State v. Samuels*, 44 S.W.3d 489, 492 (Tenn. 2001). If our review reflects that "the trial court appl[ied] inappropriate mitigating and/or enhancement factors or otherwise fail[ed] to follow the Sentencing Act, the presumption of correctness fails" and our review is de novo. *Carter*, 254 S.W.3d at 345.

In this case, Appellant was convicted of possession of more than .5 grams of cocaine with the intent to sell. T.C.A. § 39-17-417(a)(2). A violation of this subsection is a Class B felony. T.C.A. § 39-17-417(c)(1). Appellant, as a Range I, standard offender, was subject to a sentence of eight to twelve years. T.C.A. § 40-35-112(b)(4).

At the sentencing hearing, the trial court applied two enhancement factors and one mitigating factor. The trial court determined that Appellant had a history of criminal convictions in addition to those necessary to establish the appropriate range, factor (1), and that Appellant had previously failed to comply with the conditions of a sentence involving release into the community, factor (8). T.C.A. § 40-35-114(1), (8). The trial court did find, however, that Appellant's criminal conduct did not cause or threaten serious bodily injury. T.C.A. § 40-35-113(1).

The trial court commented on Appellant's multiple convictions and placed "great weight" on his criminal history. The trial court also took into account that the presentence report reflected Appellant's daily use of marijuana from the age of twenty-nine to the date of the offense, approximately three years. Appellant denied this at sentencing. The trial court did not find Appellant to be credible, noting his past probation revocation and the denial of at least one of his prior criminal convictions. Ultimately, Appellant was sentenced to eleven years and six months in confinement.

The record supports the trial court's determinations. Since the age of nineteen, Appellant has been convicted of one felony and five misdemeanors and has violated probation on at least one occasion. Further, Appellant had frequent drug use of marijuana and committed an aggravated burglary while on bond for the offenses at issue herein. The trial court properly sentenced Appellant. Appellant is not entitled to relief on this issue.

Conclusion

For the foregoing reasons, the judgments of the trial court are affirmed.

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JERRY L. SMITH, JUDGE